

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

IN THE MATTER OF THE APPLICATION)	
OF CHESAPEAKE UTILITIES)	
CORPORATION REGARDING ITS)	
ACQUISITION AND CONVERSION)	PSC Docket No. 18-0933
OF PROPANE COMMUNITY GAS)	
SYSTEMS)	
(Filed June 29, 2018))	

**PETITION OF THE DELAWARE ASSOCIATION OF ALTERNATIVE
ENERGY PROVIDERS, THE MID-ATLANTIC PROPANE GAS
ASSOCIATION, AND THE MID-ATLANTIC PETROLEUM
DISTRIBUTORS ASSOCIATION FOR LEAVE TO INTERVENE**

Pursuant to 26 *Del. Admin. C.* §2.9 (Public Service Commission Rules of Practice and Procedure), the Delaware Association of Alternative Energy Providers, the Mid-Atlantic Propane Gas Association, and the Mid-Atlantic Petroleum Distributors Association petition for leave to intervene as parties in the above-captioned docket, and in support hereof state:

1. The names and addresses of the parties seeking to intervene are as follows:

a) Delaware Association of Alternative Energy Providers (“DAAEP”)

Andrew Lambert, Sr.
1000 N. Broad Street
Middletown, DE 19709

- b) Mid-Atlantic Propane Gas Association (“MAPGA”)

Jonathan R. Williams
250 West Main Street, Suite 100
Charlottesville, VA 22932

- c) Mid-Atlantic Petroleum Distributors Association (“MAPDA”)

Ellen Valentino
3 Church Circle, #201
Annapolis, MD 21401

2. The petitioners are represented by the following counsel:

Francis J. Murphy, Esq. DE Bar ID #223
MURPHY & LANDON
1011 Centre Road, Suite 210
Wilmington, DE 19805
Telephone: (302) 472-8100
Email: fmurphy@msslaw.com

3. The DAAEP is an association of the State of Delaware with members who provide propane and propane service in Delaware.

4. The MAPGA is an association of the State of Delaware with members who provide propane and propane service in Delaware.

5. The MAPDA is an association of the State of Maryland with members who provide propane, heating oil, and gasoline in Delaware.

6. In its Application opening this docket, Chesapeake asserts that it is a diversified energy company, whose business includes the distribution and wholesale marketing of propane. (App. p.2, n. 2) Chesapeake says that the purpose of the Application is to acquire all of the Propane Community Gas

Systems (“PCGS”) owned and operated by its unregulated subsidiary, Sharp Energy, Inc. (“Sharp”), noting that Sharp owns more than 40 such propane systems, and that Chesapeake intends to place the systems into rate base. (App. p. 7 and n. 16) Notably, the scope of the Application is not limited to the acquisition of Sharp propane systems. The testimony of Shane Breakie, Director of Energy Services for Chesapeake (filed with the Application), makes specific reference to community propane systems that “are owned by unaffiliated companies.” (See Breakie Direct p.8) According to Breakie’s testimony, he “supports” a Chesapeake subsidiary, Sandpiper Energy, Inc. (“Sandpiper”). And according to the testimony Chesapeake’s Director of Gas Operations, Engineering and Supply, Christopher Redd (filed with the Application), Sandpiper has already completed 6,000 propane customer conversions and is in the process of converting roughly 10,000 additional propane customers. (See Redd Direct pp. 3-4)

7. The purpose of the Application is to allow Chesapeake to create “anchor customers” at ratepayer expense, so that Chesapeake can greatly expand its natural gas distribution system to serve new businesses and residents that it does not presently serve. (App. p.5) Chesapeake proposes this expansion of its natural gas system, to be paid by existing ratepayers, so that it can supplant existing propane distributors, who are already providing Delawareans with an environmentally friendly and economical energy option.

8. Chesapeake's Application asks the Commission to regulate the rates charged to the public it serves for the cost of propane and the conversion of Sharp's propane systems to natural gas. (App. p. 11; See also Chesapeake's Opposition to Motion to Dismiss Filed by the Commission Staff and the Division of the Public Advocate p.2.) Chesapeake also seeks Commission approval to convert inside-the-home propane appliances to natural gas and to spread the cost to all Chesapeake customers through a new tariff rate. (App. p. 8) In essence, Chesapeake is asking the Commission to take the unprecedented step of regulating the sale and distribution of propane in Delaware.

9. Unlike other state jurisdictions, the Delaware General Assembly granted the Commission broad authority to establish its own rules of practice and procedure, including those governing petitions to intervene in its proceedings. 26 Del. C. § 503(a). Petitions for leave to intervene are controlled by Rule 2.9. The Rule allows "[a]ny person" to petition to intervene. Under paragraph 2.9.1.2, the petition must describe the petitioner's interest in the proceeding. And under paragraph 2.9.1.3, the petition must set forth "a concise statement of why the petitioner's interest will not be adequately represented by the parties to the proceeding *or* why participation in the proceeding would be in the public interest."

The petitioners' request to intervene meets both prongs of the standard, because: a) their interest will not be adequately represented by the parties to the proceeding, and b) their participation is in the public interest.

10. The petitioners are associations with members who market, sell, and distribute propane, heating oil, and gasoline in Delaware. The petitioners, their members, their employees, and their customers have a direct interest in the outcome of this proceeding. There is a substantial likelihood that the petitioners' businesses and finances will be significantly affected by Chesapeake's proposal to have the Commission regulate the sale and distribution of propane in Delaware. The scope of the regulation not only includes regulation of propane gas rates, but also the conversion of community propane systems to natural gas. And Chesapeake's Application even extends to propane systems not owned by its Sharp subsidiary. Chesapeake proposes to have the Commission regulate propane rates and to approve a process that will pressure customers to convert their in-home appliances to natural gas. There is also a likelihood that the members and employees of the petitioners will be directly affected by Chesapeake's proposal to significantly expand the reach of its natural gas service to eliminate or stifle energy competition in the future in large areas of Delaware. The petitioners share a common interest in the distribution and sale of alternative energy supplies and services to their customers for use in both residential and commercial settings.

11. The interests of the petitioners will not be adequately represented by the Commission Staff or the Public Advocate. The Staff and the Public Advocate are not regularly and actively engaged in the propane business or the supply of energy sources that are alternatives to natural gas. Therefore, the Staff and the Public Advocate lack the practical day-to-day experience of operating energy businesses, including propane businesses. The petitioners bring to the table a wealth of experience and knowledge about propane systems and their operation, as well as the comparative benefits of propane versus natural gas. Chesapeake's application is based, in large measure, on the alleged environmental and economic benefits of natural gas as compared to propane, and the alleged benefits to the public. The petitioners are in a unique position to address Chesapeake's assertions on these and other related subjects, and thereby bring an important perspective as the Commission assesses whether the public interest is being served by Chesapeake's Application.

12. The petitioners are also in a unique position to protect the interests of their existing propane customers, who are members of the public and are not otherwise in a position to intervene and have their voices heard in an economical and meaningful way.

13. The DAAEP has been permitted to intervene in prior Commission proceedings involving Chesapeake. *See In the Matter of the Application of*

Chesapeake Utilities Corp., PSC Docket No. 15-1734, Commission Order No. 8878 (May 17, 2016) (attached hereto as Exhibit A), approving Order No. 8860, by Hearing Examiner Mark Lawrence (March 11, 2016)(attached hereto as Exhibit B). Admittedly Commission Order No. 8878 was reversed and vacated by an order of the Delaware Superior Court in *Chesapeake Utilities Corp. v. Delaware Public Service Commission*, C.A. No. K17A-01-001 WLW, (Del. Super., June 7, 2017), Witham, R. J. (“CUC”)(attached hereto as Exhibit C). However, as explained below, the order does not constitute a valid precedent, is distinguishable, and incorrectly decided as a matter of law and fact.

14. In Order No. 8878, the Commission rightly recognized that it historically employed a liberal policy for granting intervention petitions. Order p.5. The Commission noted that the DAAEP, which seeks to intervene here, brings its unique industry perspective and additional information to such proceedings, allowing the parties to build a more robust evidentiary record. *Id.* And the Commission observed that the confidentiality of information has not presented any difficulty in prior proceedings in which the DAAEP has been granted leave to intervene. The petitioners would add that: a) the confidentiality of information can be protected by an appropriate confidentiality order, if need be; and b) under Commission Rule 2.9.4, intervention is subject to reasonable terms and conditions as the Commission or designated Hearing Examiner may prescribe,

and thus allows for the imposition of limits on the participation of an intervenor in Commission proceedings to control costs and prevent the unnecessary litigation of issues. Thus the Commission's intervention rule contains a built-in safeguard to prevent abuse.

15. The significance of the issues presented in this docket cannot be overstated. Chesapeake is asking the Commission to regulate the propane business in Delaware. Chesapeake must concede that the propane business operated by its wholly owned subsidiary, Sharp, is not subject to regulation by the Commission, because the sale and distribution of propane is outside the Commission's jurisdiction. Yet, Chesapeake argues that the Commission can regulate the very same propane business, provided that the business is transferred to Chesapeake with the stated intent to convert the propane business to natural gas. Significantly, Chesapeake cannot tell the Commission or the public how long the conversion of the propane business will take, nor could it give a reliable timetable, given the number of systems (more than 40) and variables involved. Plainly the process could take a significant number of years, and might never be completed. During that extended period of time, the Commission would presumably be exercising regulatory authority over the same propane business that it cannot now lawfully regulate.

16. Presumably Chesapeake will oppose this petition to intervene and will cite in support the Superior Court's Order in *CUC* (Exhibit C hereto). The Superior Court's order should not be followed here for several reasons. First, the order in *CUC* recognized that all of the issues in the underlying Commission case had been settled, with the sole exception of the DAAEP's standing to intervene. Therefore, the Superior Court should not have decided the intervention issue, because there was no longer an underlying controversy that might be affected by its order. The settlement of the underlying case made the issue of intervention moot, and the Superior Court's order was, in essence, an advisory opinion, which cannot be considered precedential. *Rollins International, Inc. v. International Hydronics Corp.*, 303 A.2d 660, 662 (Del. 1973)(Delaware courts do not entertain suits seeking an advisory opinion or an adjudication of hypothetical questions.). Because the intervention issue was moot and, at best, advisory only, the Superior Court lacked subject matter jurisdiction to issue its order. The fact that the parties, including the DAAEP, agreed to preserve the intervention issue for appeal and briefed the issue could not confer jurisdiction on the Superior Court, as parties cannot confer jurisdiction upon a court by agreement, where it does not otherwise exist. *El Paso Gas Co. v. Transamerican Gas Corp.*, 669 A.2d 36, 39 (Del. 1995)(It is a cardinal principle of the law that jurisdiction of a court over the subject matter cannot be conferred by consent or agreement.).

Second, the CUC order is factually distinguishable. This case involves Chesapeake's Application asking the Commission to: a) Determine that the Commission has the power to regulate rates that customers are charged for propane and related equipment and systems; b) Set the parameters by which it can convert propane systems to natural gas; and c) Regulate the conversion of propane appliances to natural gas. The petitioners' interest in this docket is necessarily far greater than in *CUC*, as Chesapeake is asking the Commission to regulate a business activity, namely the sale and distribution of propane, in which members of DAAEP, MAPGA, and MAPDA are presently engaged.

Third, the Superior Court's Order in *CUC* is wrong as a matter of law and fact. The Commission plainly has broad statutory and regulatory authority to control intervention petitions before it, and the Superior Court's order incorrectly sought to place an artificial limit on the Commission's authority that is not contained in Delaware law.

17. On September 21, 2018, the Commission Staff and the Division of the Public Advocate filed a motion to dismiss Chesapeake's Application on the ground that the Commission lacks subject matter jurisdiction, because Chesapeake is asking the Commission to engage in the regulation of propane. Chesapeake opposes the motion. Therefore, this docket raises a vitally important and precedent

setting issue of the Commission's authority to regulate propane, which will directly affect the interests of the petitioners and their members.

18. Good cause exists to grant this petition. Good cause is demonstrated where a petitioner shows that its application would further the interests of justice. *See Kaiser-Frazer Corp. v. Eaton*, 101 A.2d 345, 351 (Del. Super. 1953)(Good cause existed to lift a default judgment because it served the interest of justice, even though moving party had notice of pendency of action and intentionally elected to default.). "Good cause" is a very liberal standard and should be applied in a way that favors intervention. Here, the petitioners have demonstrated that this proceeding raises a major and seminal issue concerning the jurisdiction of the Commission, namely, its power to regulate the propane business in Delaware. It is a matter of great importance to the public in Delaware, and to the petitioners, their employees, and their customers. The petitioners have demonstrated their substantial stake in this docket and also their ability to protect, not only their own interests, but the public interest as well. And the petitioners' intervention will not delay the Commission's consideration of the pending motion to dismiss or otherwise adversely affect the proceeding.

Wherefore, the petitioners respectfully request that they be granted leave to intervene in this proceeding as a party for all purposes.

Respectfully submitted,

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Petroleum Distributors Association

Dated: October 11, 2018

CERTIFICATE OF SERVICE

I, Francis J. Murphy, do hereby certify that on October 11, 2018, a true and correct copy of PETITION OF THE DELAWARE ASSOCIATION OF ALTERNATIVE ENERGY PROVIDERS, THE MID-ATLANTIC PROPANE GAS ASSOCIATION, AND THE MID-ATLANTIC PETROLEUM DISTRIBUTORS ASSOCIATION FOR LEAVE TO INTERVENE was issued to the following persons in the manner indicated:

VIA E-FILE (DELAFILE)

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EXHIBIT

A

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION OF)
CHESAPEAKE UTILITIES CORPORATION FOR A)
GENERAL INCREASE IN ITS NATURAL GAS RATES) PSC Docket No. 15-1734
AND FOR APPROVAL OF CERTAIN OTHER CHANGES)
TO ITS NATURAL GAS TARIFF (FILED DECEMBER)
21, 2015))

ORDER NO. 8878

I. PROCEDURAL BACKGROUND

1. December 21, 2015, Chesapeake Utilities Corporation ("CUC") filed an Application with the Commission for a general increase in its natural gas rates and for approval of certain changes to its tariff regarding natural gas.
2. On January 19, 2016, the Commission adopted Order No. 8848, which opened this docket, appointed a Hearing Examiner, directed the publication of notice of the filing, and set a deadline of February 26, 2016 for the filing of any petitions for leave to intervene.
3. On February 25, 2016, the Delaware Association of Alternative Energy Providers, Inc. ("DAAEP") filed a Petition for Leave to Intervene.
4. On March 4, 2016, CUC filed a brief opposing DAAEP's Petition.
5. On March 9, 2016, DAAEP filed a Reply in support of its Petition.
6. On March 11, 2016, the Hearing Examiner assigned to this docket issued Order No. 8860, which granted DAAEP's Petition for Leave to Intervene.

7. On March 16, 2016, CUC filed with the Commission a Petition for Interlocutory Appeal of Order No. 8860.

8. On March 21, 2016, DAAEP filed an Answer to CUC's Petition for Interlocutory Appeal.

9. On April 5, 2016, the Commission met at its regularly-scheduled meeting to consider the CUC's Petition for Interlocutory Appeal and DAAEP's Answer and to hear oral argument from the parties. After deliberations, the Commission denied CUC's Petition, thus allowing Order No. 8860 to stand. This Order explains the Commission's findings and decision.

II. APPLICABLE LAW

10. Any person seeking to intervene in a proceeding, other than an original party to a proceeding or a party entitled to participate as a matter of right, must file a petition to intervene stating "why the petitioner's interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest." 26 Del. Admin. C. § 1001-2.9.1.

11. The Commission may delegate to the designated Hearing Examiner the authority to grant or deny a party's petition for leave to intervene, subject to an interlocutory appeal pursuant to 26 Del. Admin. C. § 1001-2.16. 26 Del. Admin. C. § 1001-2.9.3.

12. Interlocutory appeals from rulings of a Hearing Examiner during the course of a proceeding may be taken to the full Commission by any party only where extraordinary circumstances necessitate a prompt decision by the Commission to prevent substantial injustice or detriment to the public interest. 26 Del. Admin. C. § 1001-2.16.1.

The Commission shall determine if the Petition and any answers thereto justify interlocutory review, and if no Commission action occurs within thirty days of the Petition filing, then it shall be deemed denied by operation of law. 26 Del. Admin. C. § 1001-2.16.5.

III. CUC'S PETITION FOR INTERLOCUTORY APPEAL & ARGUMENT

13. CUC argued in its Petition and at oral argument before the Commission that intervenor status should not be granted to DAAEP for the following reasons:

- a. Despite the fact that DAAEP has been allowed to intervene in similar prior dockets and that the Commission has historically exercised a liberal intervention policy, DAAEP has failed to meet the requirements to intervene (Hearing Tr. 21:1-23).
- b. Other state utility commissions in Maryland, New Jersey, Pennsylvania, and other states have denied similar intervention requests by unregulated propane and oil dealers seeking to protect their competitive interests, on grounds that those commissions lack the statutory authority to protect such interests (Hearing Tr. 14:14-15:5), except where state law specifically authorizes such intervention (Hearing Tr. 22:20-24:4).
- c. Staff and the Delaware Division of the Public Advocate ("DPA") will better represent the interests of CUC's customers with respect to any proposed rate increased or tariff changes (Hearing Tr. 16:15-18).
- d. DAAEP seeks to represent the competitive interests of its member companies by limiting natural gas expansion, which is contrary to the "public interest" and therefore contrary to 26 Del. Admin. C. § 1001-2.9.1 (Hearing Tr. 14:14-15:5); the Commission is not authorized to consider or protect the competitive interests of DAAEP in setting the rates of a regulated utility (Hearing Tr. 16:23-17:17).
- e. DAAEP's status as an intervenor and a signatory to settlement agreements in prior CUC rate case dockets is irrelevant (CUC Petition for Interlocutory Appeal ¶¶ 8-9).

IV. DAAEP's ANSWER & ARGUMENT

14. DAAEP responded in its Answer and at oral argument before the Commission that it should be granted status as an intervenor for the following reasons:

- a. Developing a robust evidentiary record in this proceeding that includes the unique industry perspective of DAAEP is in the public interest (Hearing Tr. 31:14-20).
- b. The Commission has historically employed a liberal policy for considering intervention petitions, including granting similar requests by DAAEP in prior CUC rate cases (Hearing Tr. 34:5-19).
- c. Because DAAEP is a signatory to settlement agreements in prior proceedings that may be modified in the instant case, it should be allowed to intervene to protect its interests (Hearing Tr. 38:14-39:9).
- d. DAAEP has access to relevant information regarding market conditions that Staff and the DPA will not be able to access easily unless DAAEP is allowed to intervene (Hearing Tr. 39:18-40:12).

V. POSITIONS OF OTHER PARTIES

15. Staff represented at oral argument that it was not taking a position on CUC's Petition (Hearing Tr. 41:1-2).

16. The Delaware Division of the Public Advocate ("DPA") noted at oral argument that the presence of intervenors in a docket can increase the costs billed to consumers, but it also prefers to have broad public participation (Hearing Tr. 41:11-24). The question the Commission must answer in deciding whether or not to grant CUC's Petition is whether Staff and the DPA are capable of representing the interests of DAAEP (Hearing Tr. 42:3-11).

17. Delmarva Power & Light Company, which was granted status as an Intervenor on March 1, 2016 by Order No. 8857, did not participate

EXHIBIT

B

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE APPLICATION)	
OF CHESAPEAKE UTILITIES CORPORATION)	
FOR A GENERAL INCREASE IN ITS NATURAL)	
GAS RATES AND FOR APPROVAL OF CERTAIN)	PSC Docket No. 15-1734
OTHER CHANGES TO ITS NATURAL GAS)	
TARIFF (FILED DECEMBER 21, 2015))	
)	

ORDER NO. 8860

GRANTING DAAEP INC.'S INTERVENTION

AND NOW, this 11th day of March, 2016, pursuant to the authority granted me in PSC Order No. 8848 dated January 19, 2016, this Hearing Examiner having considered the Petition for Leave to Intervene ("the Petition") filed by the Delaware Association of Alternative Energy Providers, Inc. ("DAAEP") on February 25, 2016, which Chesapeake Utilities Corporation ("Chesapeake") opposes;¹

NOW, THEREFORE,

1. The Petition for Leave to Intervene is GRANTED.
2. In PSC Order No. 8848, the Commission ordered that the deadline for filing a Petition for Intervention was February 26, 2016. (See Order, ¶8.)
3. Thus, DAAEP's Petition to Intervene ("the Petition") was timely filed. (See Title 26, Rule 2.9.2, D.A.C.)

¹ Chesapeake did not oppose the intervention of Delmarva Power & Light Company in this Docket. (See PSC Order No. 8857, March 1, 2016, granting intervention.)

4. Pursuant to Title 26, Rule 2.9.1.3, D.A.C, of the
Commission's *Rules of Practice and Procedure*:

(b) "[A petition to intervene shall set forth] a concise statement of why the petitioner's interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest..." (emphasis supplied.)

NOW, THEREFORE,

1. DAAEP is an incorporated association of a number of Chesapeake Utility Corporation's ("Chesapeake's") competitors. (Petition, ¶¶ 5, 10-11.) DAAEP has named six (6) of its members. (DAAEP Reply, fn. 1) In its Petition, DAAEP alleges that its members "share a similar interest in the distribution and sale of alternative energy supplies and services to their customers [including propane] for use in heating and other residential and commercial uses." (Petition, ¶11.)
2. DAAEP's Petition also alleges that "[t]he docket will have a direct impact upon DAAEP's members, and their employees, who may be significantly harmed" if the Commission approves Chesapeake's rate Application. (*Id.*) Finally, as required by Title 26, Rules 2.9.1.2, D.A.C of the Commission's *Rules of Practice and Procedure*, DAAEP alleges that it "has a direct interest in the outcome of the proceeding, and the interests of the members of DAAEP are inadequately represented in this proceeding without intervention." (*Id.* at ¶10.)

3. According to DAAEP, it should be permitted to intervene in this Docket because Chesapeake has proposed "new service offerings" which seek to expand Chesapeake's market potentially to the disadvantage of DAAEP's members. (*Id.* at ¶¶3-4.) DAAEP further alleges that Chesapeake's expansion "has been before the Commission on multiple occasions since 2007" (*Id.* at ¶4.) In both the 2007 and 2012 dockets, DAAEP was permitted to intervene either by the Commission or the Hearing Examiner. (PSC Order No. 7325 (Dec. 4, 2007), *docket resolved by a Settlement Agreement* i.e. PSC Docket No. 07-186); (HE's Order No. 8210 (August 22, 2012) (*docket resolved by a Settlement Agreement* i.e. PSC Docket 12-292)
4. Moreover, DAAEP was permitted to intervene in two (2) additional dockets involving Chesapeake, Dockets 97-72T and 05-322. (DAAEP Reply, ¶1.) According to DAAEP, "DAAEP's interest in Chesapeake's expansion-related dockets before the Commission has been firmly established over the past 15 years." (*Id.* at ¶3.)
5. In addition to protecting its members' interests, in this Docket, DAAEP is primarily concerned with two (2) of Chesapeake's proposed offerings: a) a Municipal Natural Gas Expansion Program; and b) a Temporary Gas Storage Tank Program. (Petition, ¶¶¶ 3,7,8,9; DAAEP Reply, ¶2.)
6. These two (2) programs are briefly described in Paragraph 7 of Chesapeake's Application, and are described in more

detail in the pre-filed testimony of Shane Breakie, Chesapeake's Director of Energy Services. According to DAAEP, without intervention and thereafter discovery, crucial details of Chesapeake's offerings will not be disclosed to DAAEP which represents many of Chesapeake's competitors in the gas market. (Petition, ¶¶13-14.)

7. DAAEP seeks to monitor this Docket to ensure that Chesapeake has and will comply with the parties' Settlement Agreements in Docket No. 07-186 (PSC Order No. 7434, Sept. 2, 2008) and Docket No. 12-292 (PSC Order No. 8479 Nov. 5, 2013). These Settlement Agreements collectively involve expansion revenue calculations based upon an agreed upon model, the Internal Rate of Return Model or "IRRM" relating to rate base inclusion of main extensions, main extension requirements for expansion, an audit reviewable in this Docket, and new rates for a designated "expansion area" in Sussex County. (*Id.* at ¶9; DAAEP Reply, ¶5; This Order, §7, *infra.*)
8. DAAEP argues that that the parties' Settlement Agreements in two (2) recent Chesapeake dockets could be affected by the Municipal Natural Gas Expansion Program. (*Id.* at ¶9.) In the parties' Settlement Agreement in Docket 12-292, the "expansion area" for Expansion Area Residential Rate Services-1 and 2, EGS (Expansion Area General Service) and EMVS (Expansion Area Medium Volume Service) was limited to specific areas in Sussex County. Chesapeake's current

proposal may or may not seek to expand that expansion area in Sussex County (and Kent County) at those rates as the Application does not state that the Municipal Program is limited to the previously agreed upon expansion area with those rates. (PSC Order No. 8479, (Nov. 5, 2013), §12 & Exh. C.)

9. Specifically, in Docket No. 12-292, for these four (4) rates, the parties agreed that "the southeastern Sussex County, Delaware Expansion Area is defined as the area east of Chesapeake's district regulator station located on Route 9 in Lewes, Delaware that is connected to Chesapeake's distribution main and any area that is connected to Chesapeake's distribution main behind the three (3) Eastern Shore Natural Gas Transmission Pipeline City Gates located in Dagsboro, Frankford, and Selbyville, Delaware." (PSC Order No. 8479, Exh. "A," ¶12.)
10. According to Chesapeake's current Application, this Program broadly "applies to municipalities and unincorporated towns ... seeking to extend gas distribution service into designated areas within the town limits." (Shane Breakie, Chesapeake's Director of Energy Services, p.4.²) Under this program, among other things, the Company would advance the town the funds necessary to complete the project and the

² I hereby take administrative notice of Mr. Breakie's testimony filed with the Commission. (Commission Rule 2.13.1 provides that the "Commission may consider Delaware Uniform Rules of Evidence as a guide"; see Del. R. Evid. 202(d)(1)(B)) re Judicial Notice. Chesapeake has the right to request to be heard by me as to this issue pursuant to Del. R. Evid. 202(e). If Chesapeake files an Interlocutory Appeal of this Order without making this request, I will assume that it has waived this right.

town is required to pay the funds back within six (6) years after the mains are installed. (Breakie, p.12.)

11. DAAEP also questions Chesapeake's proposal to fund the Municipal Natural Gas Expansion Project through a Regulatory Asset as a precursor to including it in Chesapeake's rate base. (Petition, ¶¶ 8,9; Breakie, p.3.) The Company maintains that this program "fits within existing Tariff language Rule and Regulation 6.3 Financial Contributions" addressing Contributions In Aid Of Construction ("CIAC"), the Company instead seeks to create a Regulatory Asset. (Breakie, p.12; 4th Rev. Tariff Sheet 12.2 Nov. 5, 2013.)
12. DAAEP essentially argues that the Commission must examine whether Chesapeake may create a Regulatory Asset deferring it now to its balance sheet and not reporting it for tax purposes while reserving the right to later seek to include it in rate base. (Petition, ¶¶7,8.) Under certain limited circumstances, the Commission has permitted Regulatory Assets, although to date, the Commission simply has never had the opportunity to address a Regulatory Asset like Chesapeake is proposing.
13. Next, Chesapeake owns an unregulated propane subsidiary, Sharp Propane, which competes with DAAEP's members, and according to DAAEP, the Application does not outline whether Sharp Propane and/or Chesapeake is participating to some extent in Chesapeake's proposed Temporary Gas Storage

Program. (*Id.* at ¶7.) DAAEP argues that Chesapeake "has the ability in this Docket to place its affiliate on equal footing with the members of DAAEP." (Reply, ¶7.)

14. This Temporary Gas Storage Program would allow temporary propane (or CNG) to be used for finished developments for which the natural gas infrastructure is not yet completed. (Petition, ¶7.) The specifics of how this temporary propane program will work, its duration at each site, and which safety precautions are being taken, are not described in the Application, but will certainly be addressed in discovery.
15. DAAEP questions whether Chesapeake may include these costs in rate base, and whether it is "illegal subsidization of new customers by old customers." (Petition, ¶8; see pre-filed testimony of Shane Breakie, Chesapeake's Director of Energy Services, pp.3-4.) Specifically, Mr. Breakie's pre-filed testimony states that "the Company proposes to revise its IRR[M] economic test to allow for the costs of utilizing temporary gas storage tanks and equipment conversion costs to be included in the costs of a particular project..." (Breakie, p.4.)
16. Chesapeake unsuccessfully attempts to prevent DAAEP's intervention by arguing that this is a base rate case. DAAEP persuasively argues that 26 Del. C. §303(a) "does not speak to rates alone but also includes any regulation, practice or measurement which is unjust, unreasonable,

unduly preferential, or unjustly discriminatory or otherwise in violation of law." (Reply, ¶12.)

17. For purposes of considering the merits of DAAEP's Petition, I assume as true the representations made therein and in its pre-filed Testimony. I find that DAAEP has satisfied the intervention requirements of Title 26, Rule 2.9, D.A.C, of the Commission's *Rules of Practice and Procedure*.
18. This Commission has always construed its intervention rules liberally in favor of permitting interventions by business competitors, unincorporated groups and non-customer individuals with environmental interests, and homeowner's associations in rate cases, in order to continue to foster the Commission's transparency.³ (See DAAEP Reply, §10.) Commission Staff and the Public Advocate have not objected to DAAEP intervening in this Docket.
19. First, DAAEP's arguments as to why it should be permitted to intervene in this Docket are virtually the same reasons why the Commission permitted DAAEP to intervene in PSC Docket No. 07-186 after Chesapeake objected and why, as the Hearing Examiner, I permitted DAAEP to intervene in Docket No. 12-292, after Chesapeake objected. (See PSC Order 7325 (Dec. 4, 2007) & PSC Order No. 8210 (Aug. 22, 2012, respectively.) In both prior dockets, Chesapeake primarily

³ Chesapeake cites two (2) dockets in which the Maryland Public Service Commission denied business competitors from intervening in CPCN dockets, but the Maryland Commission granted the competitors "interested person status" whereby the competitors could receive and review evidence but were not permitted to formally present evidence, cross-examine witnesses or file documentary evidence or pleadings. (Chesapeake, ¶18.) However, this Commission has interpreted its Intervention rules as, if intervention is granted, full intervention is allowed unless "just cause" to do otherwise occurs after intervention is granted, for example in the case of discovery abuse.

argued what it does in this Docket, specifically that "intervention in a utility's rate case by a non-customer, for the purpose of furthering its private interest as a competitor of the utility, is improper." (PSC Order 7325, §1.)

20. According to DAAEP, it should be permitted to intervene in this Docket and conduct discovery because Chesapeake has proposed "new service offerings" which essentially seek to expand Chesapeake's market potentially at the expense of DAAEP's and Chesapeake's two (2) signed Settlement Agreements.
21. Specifically, in PSC Order No. 7325 (Dec. 4, 2007), the Commission permitted DAAEP to intervene in that service expansion docket holding that "DAAEP's interest in this matter is firmly established by a) the prospect that this case [PSC Docket No. 07-186] will result in the modification of a Settlement Agreement to which DAAEP is a signatory (approved in PSC Docket No. 97-72T); and b) DAAEP's status as a (former) party to the recently closed PSC Docket No. 05-322, the main issue of which has been transferred to this case."
22. In Docket No. 12-292, as the Hearing Examiner, I found that "the Commission holding in 2008 applied because DAAEP was a signatory to the 2008 Settlement Agreement and the issues from the prior expansion document will now be addressed in Docket 12-292, along with Chesapeake's proposed

modifications." (PSC Order No. 8210 (Aug. 22, 2012), §13.)

The parties also entered into a Settlement Agreement at the conclusion of Docket No. 12-292.

23. For the reasons described in DAAEP's Petition and described above, I find that Chesapeake's proposed Municipal Natural Gas Expansion and Temporary Gas Storage Tank Programs, each which has details which are not fully known now, including the Municipality Expansion Area, are why DAAEP's interest may "not be adequately represented by other parties to this proceeding," as required by Commission Rule 2.9.1.3.
24. Chesapeake argues that DAAEP is attempting to "stifle competition," however I find that, as argued by DAAEP, it is simply trying to understand the Application which, like every other rate application filed by a large utility, does not contain all of the details of these programs for DAAEP to completely understand the Company's proposed offerings, and their potential effect on DAAEP, its members and employees. DAAEP has extensive knowledge of the propane and natural gas industries in Delaware, both past and present, and as a signatory to two (2) prior Settlement Agreements, and thus is entitled to intervene in this Docket.
25. Although Staff and the Public Advocate are obviously equipped to address the regulatory asset, rate base, and customer subsidization issues, as the representative of some of Chesapeake's competitors with "a unique industry perspective" of Delaware's natural gas and propane

industries, and as a signatory to two (2) prior Settlement Agreements, I find that DAAEP's participation as an intervenor would substantially contribute to each party's analysis of the rather novel service offerings presented in Chesapeake's Application and developing the evidentiary record. (See PSC Order No. 4014 (May 23, 1995) (permitting DAAEP to intervene in Delmarva Power gas docket for these reasons; Reply §8.))

26. As argued by DAAEP, I also find that DAAEP's intervention as to these issues "would be in the public interest," as required by Commission Rule 2.9.1.3. (*Id.* at ¶7.) Chesapeake's argument that, through Senate Joint Resolution No. 7 signed by Governor Markell, in which the Delaware legislature has sought to expand natural gas use into unserved areas in Kent and Sussex Counties while recognizing that "natural gas has been replacing fuel oil and coal" does not persuade me otherwise as to DAAEP's right to intervene. (See 147th Gen. Assembly; legislative history.)
27. On July 31, 2014, the legislature expressed its desire that DNREC and DIDO attempt to establish a public-private partnership to expand natural gas downstate to lower energy costs and attract business. (*Id.*) However, nowhere in that legislation does the legislature state that it intended for the Commission to aid a regulated natural gas distributor like Chesapeake in attempting to begin to virtually

extinguish the economic interests of alternative fuel dealers and the economic interests of Kent County and Sussex County residents who do not reside near Chesapeake's mains and who rely upon alternative fuels. (*Id.*) I attach Senate Joint Resolution 7 as "Attachment 1" hereto.

28. If the Commission does not grant DAAEP's intervention, it would not be following the two (2) prior Settlement Agreements between the parties entered into following interventions, the Commission's broad intervention rules, and the Commission's policy of liberally granting interventions.
29. When the Commission deliberates after discovery and the evidentiary hearings in this base rate case are concluded, the Commission will be faced with many rate and program implementation issues as to Chesapeake's proposed offerings, which offerings should be included in rate base and when, and how Chesapeake's offerings should be reconciled with Senate Joint Resolution No. 7. At this early stage of this Docket, it is premature to deny this Intervention Petition.
30. Finally, if Chesapeake finds that Confidential or Proprietary information becomes involved in this Docket, Chesapeake may utilize Commission Rules 1.11 and 2.9.4 to request that I as the Hearing Examiner protect that information from unlawful disclosure to DAAEP. Chesapeake can also use a Confidentiality Agreement where appropriate.

31. In conclusion, for the reasons described above, the Petition for Leave to Intervene filed by the Delaware Association of Alternative Energy Providers, Inc. is GRANTED. If Chesapeake files an Interlocutory Appeal of this Order to the Commission pursuant to Commission Rule 2.16, it is required to do so by 5 p.m. on Wednesday, March 16, 2016.

BY ORDER OF THE COMMISSION

A handwritten signature in cursive script, reading "Mark Lawrence", written in dark ink. The signature is positioned above a horizontal line.

Mark Lawrence
Senior Hearing Examiner

ATTACHMENT 1

SPONSOR: Sen. Marshall & Rep. Mulrooney & Sen. Bonini &
Rep. Ramone

DELAWARE STATE SENATE
147th GENERAL ASSEMBLY

SENATE JOINT RESOLUTION NO. 7

REQUESTING THAT DELAWARE ECONOMIC DEVELOPMENT OFFICE AND DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL EXAMINE ISSUES AND OPPORTUNITIES RELATED TO A NATURAL GAS PIPELINE EXTENSION FROM NEW CASTLE COUNTY INTO KENT AND SUSSEX COUNTIES.

WHEREAS, the "Blue Collar" Task Force was composed of four legislators, five cabinet secretaries, eight representatives of business and labor groups throughout the state, and three additional public appointed members; and

WHEREAS, the Task Force met as a group and additionally held public hearings throughout Delaware to listen to the concerns of citizens and local businesses, both large and small; and

WHEREAS, the Task Force recognized that natural gas has been replacing fuel oil and coal for producing energy and electricity; and

WHEREAS, the Task Force received testimony that the lack of easily available natural gas in Kent and Sussex affects the cost of energy and our ability to attract manufacturing businesses; and

WHEREAS, the Task Force found that the creation of a gas line extension from New Castle County could be achieved through a public-private partnership that would lower energy cost for both businesses and individual homeowners; and

WHEREAS, the Task Force concluded that such an extension would capitalize on the state's natural resources, promote reductions in the cost of doing business, increase the general perception of Delaware as encouraging reasonable growth, and provide a strategic infrastructure project that will create local jobs; and

WHEREAS, the Task Force recommends DEDO and DNREC take the lead to work with private sector providers to develop a plan for implementation of such a pipeline extension;

NOW, THEREFORE;

BE IT RESOLVED by the Senate and the House of Representatives of the 147th General Assembly of the State of Delaware, with the approval of the Governor, that DEDO and DNREC report to the General Assembly their preliminary findings and recommendations including a timeline regarding the extension of a natural gas pipeline to Kent and Sussex Counties by June 1, 2014.

SYNOPSIS

This joint resolution directs DEDO and DNREC to take the lead to work with private sector providers to develop a plan for implementation of such a pipeline extension, as recommended by the "Blue Collar" Task Force.

Author: Senator Marshall

EXHIBIT

C



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CHESAPEAKE UTILITIES	:	
CORPORATION,	:	C.A. No. K17A-01-001 WLW
	:	Kent County
Appellant,	:	
	:	
v.	:	
	:	
DELAWARE PUBLIC SERVICE	:	
COMMISSION,	:	
	:	
Appellee.	:	

Oral Argument: May 12, 2017
Decided: June 7, 2017

ORDER

Upon Appeal from a Decision of the
Delaware Public Service Commission.
Reversed and Vacated.

William O'Brien, Esquire, Associate General Counsel for Chesapeake Utilities Corporation, Daniel O'Brien, Esquire, Venable LLP, Wilmington, Delaware, Brian M. Quinn, Esquire, *pro hac vice*, Venable LLP, Baltimore, Maryland; attorneys for Appellant Chesapeake Utilities Corporation.

Todd A. Coomes, Esquire and Selena E. Molina, Esquire of Richards Layton & Finger; Wilmington, Delaware; attorneys for Appellee Delaware Association of Alternative Energy Providers, Inc.

Brenda R. Mayrack, Esquire of the Department of Justice, Dover, Delaware; attorney for the Delaware Public Service Commission

WITHAM, R.J.

This appeal from the Delaware Public Service Commission requires the Court to resolve a single issue: may an unregulated competitor intervene to protect its interest in a regulated utility's rate proceeding?

Applicant-Below/Appellant Chesapeake Utilities Corporation ("Chesapeake") appeals from two orders that were part of a final determination of the Delaware Public Service Commission ("the Commission"). The first order grants the petition of Intervenor-Below/Appellee Delaware Association of Alternative Energy Providers, Inc. (DAAEP) to intervene. The second denies Chesapeake's petition for an interlocutory appeal and affirms the earlier order granting intervention.

This Court finds that the Commission exceeded its statutory authority when it granted DAAEP's petition to intervene in a public utility's rate case because the sole interest claimed by the intervenor was as an unregulated competitor to the public utility. The intervention orders of the hearing examiner and the Commission are thus reversed. Because the orders regarding intervention are reversed on that ground, the Court does not reach Chesapeake's second argument: that the Commission's determination was unsupported by substantial evidence.

FACTS AND PROCEDURAL HISTORY

Chesapeake filed an application with the Commission in December 2015 for a general increase in its natural gas rates and other changes to its natural gas tariff.¹ The application sought to expand Chesapeake's natural gas offerings through new

¹ R. at 2.

programs.²

A few months later, in February 2016, DAAEP filed a petition for leave to intervene in the rate docket.³ In its petition, DAAEP asserted interests based on (1) its prior interventions, (2) its participation in prior settlement agreements, and (3) the harm that would be done to DAAEP's members and their employees if Chesapeake were permitted to expand its service offerings.⁴ It also identified issues it wished to explore if permitted to intervene.⁵ Chesapeake opposed the intervention on the grounds that (1) DAAEP was not entitled to intervene to protect its own competitive interests, (2) it was already sufficiently represented by other parties, (3) its intervention did not serve the public interest, and (4) its participation in prior proceedings was irrelevant.⁶

The intervention petition was heard by a hearing examiner, who granted the intervention.⁷ Chesapeake filed a petition for interlocutory appeal of the examiner's order, which DAAEP opposed.⁸ The full Commission affirmed the examiner's order

² *Id.* at 2, ¶ 7.

³ *Id.* at 3.

⁴ *Id.* at 3, ¶¶ 5–6, 10–11.

⁵ *See generally id.* at 3.

⁶ *Id.* at 4.

⁷ *In re Chesapeake Utils. Corp.*, No. 15-1734, Order No. 8860 (Del. Pub. Serv. Comm'n Mar. 11, 2016).

⁸ *See generally* R. at 7, 8.

by a four-to-one vote.⁹ The parties then executed a settlement agreement, which the Commission accepted.¹⁰ The settlement resolved all of the issues in the case other than DAAEP's standing to intervene, which it preserved for appeal.¹¹

This appeal followed, limited to DAAEP's standing to intervene. The parties have agreed only to appeal the examiner's decision, affirmed by the Commission.

THE PARTIES' CONTENTIONS

I. The Commission's Statutory Jurisdiction

Chesapeake argues that the Commission exceeded its statutory authority to regulate a public utility's rates and services because the statute does not provide the authority to balance or consider the competitive interests of unregulated competitors to regulated companies. It points to tribunals in other states have held that competitors of public utilities should not be able to intervene in public service commission proceedings.

DAAEP argues that the Commission has statutory authority to conduct evidentiary hearings and discretion to determine who may intervene in its proceedings. It points to prior dockets in which it has been allowed to intervene. And it distinguishes all of the authority cited by Chesapeake, contending that the

⁹ *In re Chesapeake Utils. Corp.*, No. 15-1734, Order No. 8878 (Del. Pub. Serv. Comm'n May 17, 2016).

¹⁰ *In re Chesapeake Utils. Corp.*, No. 15-1734, Order No. 8982 (Del. Pub. Serv. Comm'n Dec. 20, 2016).

¹¹ *Id.*, Ex. 1 at 1.

cases apply different statutory and regulatory schemes and that some fail to discuss intervention at all.

II. Whether The Commission's Orders Were Based on Substantial Evidence

Chesapeake argued before the Commission that DAAEP did not satisfy the “public interest” prong of the Commission’s intervention rule because (1) Senate Joint Resolution 7 demonstrated that the policy of the State of Delaware is to encourage natural gas expansion, and (2) earlier interventions by DAAEP were not a relevant criterion in determining whether a party may intervene. On appeal, Chesapeake argues that the hearing examiner’s conclusion that Chesapeake was “attempting to virtually extinguish the economic interests of alternative fuel dealers and the economic interests of Kent County and Sussex County residents who do not reside near Chesapeake’s mains¹² and who rely upon alternative fuels” was not supported by sufficient evidence and was “pure supposition.”¹³

DAAEP argues that Chesapeake’s argument does not address the totality of the hearing examiner’s reasoning or even mention the Commission’s reasoning in affirming the intervention. The hearing examiner, DAAEP contends, based his determination on several factors. The mention of Senate Joint Resolution 7 was only in response to Chesapeake’s argument. And finally, DAAEP argues, the hearing

¹² As used here, a “main” is “a principal pipe or duct in a system used to distribute water, gas, etc.” *Main*, *Dictionary.com*, <http://www.dictionary.com/browse/main?s=t> (last visited May 30, 2017)

¹³ *Chesapeake Utils. Corp.*, Order No. 8860 ¶ 27 (Mar. 11, 2016).

examiner's reasoning relating to earlier interventions was only to cite them for the proposition that DAAEP had an interest in the proceedings and that intervention was in the public interest.

STANDARD OF REVIEW

Both parties agree that the standard of review is found at 26 *Del. C.* § 510: “[T]he Commission’s findings shall be upheld if they are supported by sufficient evidence, free of error of law and not arbitrary or capricious. When factual issues are reviewed the Court shall take due account of the presumption of official regularity and the quasi-legislative function and specialized competence of the Commission.”¹⁴ “A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it. A reviewing court will not defer to such an interpretation as correct merely because it is rational or not clearly erroneous.”¹⁵ “Where an agency interpretation is longstanding and widely enforced, a reviewing court would ordinarily accord greater weight to the underlying agency interpretation of the statute in determining, for itself, the optimal interpretation.”¹⁶

DISCUSSION

I. The Commission’s Statutory Jurisdiction

The Commission exceeded its statutory authority when it granted DAAEP’s

¹⁴ 26 *Del. C.* § 510(d).

¹⁵ *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382–83 (Del. 1999).

¹⁶ *Id.* at 382 n.8.

petition to intervene because the Commission may not consider the competitive interests of unregulated competitors.

Chesapeake frames the issue as one of the Commission's "authority to balance (or even to consider) the competitive interest of unregulated fuel providers vis-a-vis a regulated utility." The primary question is whether the Commission, having adopted rules that permit entities and individuals to intervene, erred as a matter of law by permitting an unregulated competitor of the utility to intervene in rate proceedings. The Court finds that the Commission erred when it allowed an unregulated competitor to intervene to protect its own interests.

A. Delaware's Utility Regulatory Scheme

In Delaware, the Public Service Commission has "exclusive original supervision and regulation of all public utilities and also over their rates . . . so far as may be necessary for the purpose of carrying out" the provisions of Title 26 of the Delaware Code.¹⁷ As a creature of the Delaware legislature, the Commission's "powers are limited to those conferred by the legislature."¹⁸ The Superior Court has held that section 201 of the Commission's enabling statute "indicates . . . that the legislature specifically created the Commission for the purpose of balancing the

¹⁷ 26 Del. C. § 201(a).

¹⁸ *E. Shore Nat. Gas Co. v. Del. Pub. Serv. Comm'n*, 635 A.2d 1273, 1277 (Del. Super. Ct. 1993) (citing *Pub. Serv. Comm'n v. Diamond State Tel.*, 468 A.2d 1285 (Del. 1983)), *aff'd*, 637 A.2d 10 (Del. 1994), *overruled on other grounds by DiPasquale*, 735 A.2d 378.

interests of the *consuming public* with those of regulated companies.”¹⁹

Delaware public utilities are prohibited from imposing “any unjust or unreasonable or unduly preferential or unjustly discriminatory individual or joint rate.”²⁰ And in order to change their rates, utilities must notify the commission, which is authorized to hold proceedings on the lawfulness of the rate.²¹ Those proceedings must be “conducted in accordance with the rules of practice and procedure prescribed by the Commission.”²²

The Commission’s Rules of Practice and Procedure specify what is required to intervene in a rate proceeding.²³ In particular, a petition for intervention must include “a concise statement of why the petitioner’s interest will not be adequately represented by the parties to the proceeding or why participation in the proceeding would be in the public interest.”²⁴

The statute and Delaware case law do not give the Court much guidance on this question of first impression. Neither the parties nor the Court’s own research have uncovered another Delaware case which has dealt with whether an unregulated

¹⁹ *Id.* (citing *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089, 1097 (Del. 1990)) (emphasis added).

²⁰ *Id.* § 303(a).

²¹ *Id.* § 304(a), (b); *id.* § 305.

²² *Id.* § 503(a).

²³ 26-1001-2.0 *Del. Admin Code* § 2.9.

²⁴ *Id.* § 2.9.1.3.

energy company may intervene in rate proceedings to protect its competitive interests.

The Commission's practice has been to grant intervention liberally, and it has at other times granted DAAEP's requests to intervene.²⁵ While the Court affords some weight to its practice, it does not end the Court's analysis. The Commission's authority to determine whether proposed rates are unjust, unreasonable, unduly preferential, or unjustly discriminatory is necessarily limited, by the statute, to the relationship of the utility to its subscribers. And although the Commission has the authority to prescribe a rule for intervention in its proceedings, it may not administer that rule in such a way as to extend its jurisdiction to areas not contemplated by the statute. While the statute itself does not define who the members of the "consuming public" are, it is abundantly clear that DAAEP and its members would not be included given the fact that their sole interest here is as dealers of a competing product.

This outcome also makes sense as a matter of policy. If permitted to intervene, unregulated competitors may participate in discovery to the same extent as other intervenors, increasing burdens on the State (through the Commission and the Division of the Public Advocate), the regulated utility and its ratepayers, and other proper intervenors. A more carefully circumscribed intervention standard thus not only accords with the Commission's statutory grant of authority, but also effectuates the public interest by keeping the cost of rate proceedings in check.

²⁵ *In re Chesapeake Utils. Corp.*, No. 15-1734, Order No. 8878 ¶ 18 (Del. Pub. Serv. Comm'n May 17, 2016).

B. The Case Law of Other Jurisdictions

The Court has reviewed the cases Chesapeake cites from other jurisdictions. While not binding on this Court, they uniformly demonstrate the trend among other jurisdictions that apply similar statutory schemes: public service commissions may only grant intervention when authorized by governing statute, and unregulated competitors may not intervene in a regulated utility's rate proceeding.

Central Maine Power Co. v. Public Utilities Commission illustrates the proposition that the jurisdiction of a public service commission is limited to its statutory grant of authority.²⁶ In *Central Maine*, the Supreme Judicial Court held that an oil-dealer association lacked standing to intervene in rate-making proceedings concerning a regulated utility.²⁷ The association, the Court held, was “outside the class whose interests the rate regulation facets of the public utility statute seek to protect” and, as a matter of policy, “the rate regulation objectives of the statute [could] be realized without need to confer intervenor status in a rate investigation on private entities such as” the association.²⁸

DAAEP argues, forcefully, that the Maine case should be distinguished because that state's intervention rule was more restrictive than Delaware's, permitting only those that “are directly and substantially affected by the proceeding” to

²⁶ See 382 A.2d 302 (Me. 1978).

²⁷ *Id.* at 311–12.

²⁸ *Id.* at 312.

intervene.²⁹ DAAEP also points out that the holding in *Central Maine* has been superseded by new rules permitting intervention by an “interested person” in the commission’s discretion.³⁰ Still, the case’s reasoning is instructive: the statutory scheme in Delaware, like Maine’s,³¹ does not contemplate the Commission protecting the interests of unregulated competitors. It follows that an unregulated competitor’s intervention in Commission rate proceedings here would likewise be improper.

Pennsylvania Petroleum Association v. Pennsylvania Power & Light Co. further illustrates the limitations on a public service commission’s ability to protect the interests of non-participants in a regulatory scheme.³² The case raises the issue in the context of a rate-case intervenor’s standing to appeal, and is premised upon case law requiring that a party be “aggrieved” by the decision of the administrative body.³³ But the case is not entirely apposite, because the court ultimately held that the association of fuel dealers lacked standing to appeal based on the fact that competition between the utility and the association was not governed by the same

²⁹ *Id.*

³⁰ See 65-407-110 Me. Code R. § 8(B)(2).

³¹ See generally Me. Stat. tit. 35-A, § 101 (“The basic purpose of this regulatory system as it applies to public utilities subject to service regulation under this Title is to ensure safe, reasonable and adequate service, to assist in minimizing the cost of energy available to the State’s consumers and to ensure that the rates of public utilities subject to rate regulation are just and reasonable to customers and public utilities.” (emphasis added)).

³² 377 A.2d 1270 (Pa. Commw. Ct. 1977).

³³ See *id.* at 1271, 1273.

regulatory scheme.³⁴

Chesapeake also cites *Cole v. Washington Utilities & Transportation Commission*.³⁵ *Cole* was an appeal of a decision of the Utilities and Transportation Commission which denied an association of fuel oil dealers' petition for intervention because the commission's standard, either under its "substantial interest" or "public interest" test, did not embrace the association, and because the statute did not grant the commission "authority to consider the effect of a regulated utility upon a nonregulated business."³⁶ DAAEP argues that Washington's standard was more restrictive than Delaware's, and that even Washington's standard has been liberalized and now permits competitors to intervene. But as before, the case still demonstrates that a public service commission's jurisdiction is necessarily limited by its enabling statute.

*Dayton Communications Corp.*³⁷ and *In Re Michigan Consolidated Gas Co.*³⁸ support the same basic proposition as *Cole*. *Dayton* involved an unregulated competitor of a regulated telephone company that wanted to purchase wiring inside

³⁴ *Id.* at 1273 ("Because we can find here no evidence of a regulatory scheme in which both parties participate which prohibits competition between them, we must conclude that [the intervenor] does not have a substantial interest in the [Commission] order sufficient to bring this appeal.")

³⁵ 485 P.2d 71 (Wash. 1971) (en banc).

³⁶ *Id.* at 73–74.

³⁷ *Dayton Commc'ns Corp. v. Pub. Utils. Comm'n*, 414 N.E.2d 1051 (Ohio 1980) (per curiam).

³⁸ No. 282810, 2010 WL 199571 (Mich. Ct. App. Jan. 21, 2010) (per curiam).

a customer's buildings.³⁹ The wiring was installed and owned by the regulated company.⁴⁰ The Ohio Supreme Court held that the commission could not "balance the interests of a public utility . . . vis-a-vis its competitors in a complaint proceeding."⁴¹ DAAEP points out, accurately, that the case is disconnected from the standard for intervention before a public utility commission. But the case, like the others, is useful for understanding the limits of the commission's jurisdiction, not for its illustration of the intervention standard.

In *In re Michigan Consolidated Gas Co.*, the Michigan Court of Appeals sustained its public service commission's denial of two competitors' motions to intervene.⁴² The court stated that "we are not convinced of the propriety of holding that a business competitor is entitled to intervene as a matter of right in its competitor's case absent a showing of something more than possible future damage to the competitor's bottom line. Such a rule could easily lead to abuse."⁴³ DAAEP argues that the intervention-as-of-right test used by the Michigan commission is more restrictive than the Delaware standard and more akin to a standing test. It points out that the commission in Michigan also has a broader permissive intervention rule

³⁹ *Dayton*, 414 N.E.2d at 1052.

⁴⁰ *Id.*

⁴¹ *Id.* at 1054.

⁴² *In re Mich. Consol. Gas Co.*, 2010 WL 199571, at *6.

⁴³ *Id.*

which has been used to permit competitors to intervene in proceedings.⁴⁴ As Chesapeake points out, however, the permissive intervention case cited by DAAEP is a commission order only and was not appealed. And, as before, the case demonstrates that intervention rules must be applied consistently with the agency's enabling statute.

In *Commonwealth ex rel. Mid-Atlantic Petroleum Distributors Association*, Virginia's Division of Energy Regulation held that an association of unregulated sellers of alternative energy sources did not have standing to challenge a regulated utility's rates.⁴⁵ Chesapeake argues that the case demonstrates that unregulated providers have no standing in rate cases because protecting unregulated providers from competitive injury is not a statutory concern of the commission. DAAEP merely points out that the intervention standard in Virginia was a higher standard than Delaware's, requiring a "legal right" to bring a challenge. But the case remains useful for its essential holding.

A decision of the New York commission, *In re Promotional Activities by Gas and Electric Corps.*, demonstrates that a public service commission "cannot be called upon to protect a nonregulated industry from competition by a regulated utility company when it is unable to protect the latter from the competition of the former."⁴⁶

⁴⁴ See *In re DTE Gas Co.*, No. U-17691, slip op. at 5–6 (Mich. Pub. Serv. Comm'n Nov. 22, 2016).

⁴⁵ No. PUE830010, 1983 WL 20094, at *3 (Va. S.C.C. Feb. 15, 1983).

⁴⁶ 68 P.U.R.3d 162, 169 (N.Y. Pub. Serv. Comm'n 1967).

The New Jersey commission in *Superior Propane Co. v. South Jersey Gas Co.*, arrived at a similar conclusion.⁴⁷ DAAEP seeks to distinguish both cases by noting that the competitors were permitted to bring the complaints and receive a decision on the merits. But DAAEP's argument misses the mark, because both decisions ultimately resulted in the commissions finding themselves without jurisdiction to consider competitors' claims.

Two more cases accord with this general theme. The first, *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, was a case in which the Colorado Supreme Court affirmed its public utility commission's denial of intervention where allowing the intervention of competitors in the rate agreement by-pass procedure would have frustrated the statute's purpose.⁴⁸ DAAEP points out that the intervention standard differs from Delaware's and that the court decided the case under an abuse of discretion standard. But the case nonetheless shows that intervention must be granted only in accordance with the enabling statute.

The second, *In re Chittenden Recycling Services*, deals with a state environmental board which denied intervention to a competitor.⁴⁹ As DAAEP rightly noted, the state environmental board's intervention and party-status standard envisioned a property interest and not merely an interest in competing with the

⁴⁷ 60 P.U.R.3d 217 (N.J. Bd. of Pub. Util. Comm'rs 1965).

⁴⁸ 982 P.2d 316, 319, 326–27 (Colo. 1999) (en banc).

⁴⁹ 643 A.2d 1204, 1205–06 (Vt. 1994).

potential permittee. Yet *Chittenden* is still helpful insofar as it shows, again, that agencies may only allow intervention in a manner consistent with their enabling statutes.

The case law from other jurisdictions, while not binding on this Court, is persuasive despite the diversity of regulatory schemes and intervention standards the reviewing courts described. A public service commission may not grant intervention in a manner inconsistent with its statutory grant of authority.

The order affirmed by the Commission granted the DAAEP's intervention petition based primarily on DAAEP's interest as a competitor in the outcome of the proceedings.⁵⁰ Such an intervention policy is far too liberal because it ignores the Commission's status as a creature of statute. The presence of intervenors on a Commission docket must be limited to those that have an interest in the proceedings that the Commission is authorized to consider. Intervention based upon a purely economic interest as a competitor would grant the Commission unlimited authority not contemplated by the General Assembly.

II. Whether The Commission's Orders Were Based on Substantial Evidence

Having reversed the Commission's orders as to intervention on the preceding ground, the Court does not consider Chesapeake's second claim, that the Commission failed to base its order on substantial evidence when it concluded that Chesapeake's offerings would virtually extinguish the interests of fuel oil dealers and when it relied

⁵⁰ *In re Chesapeake Utils. Corp.*, No. 15-1734, Order No. 8860 ¶¶ 1–3, 19, 24 (Del. Pub. Serv. Comm'n Mar. 11, 2016).

upon DAAEP's intervention in earlier cases.

Additionally, Chesapeake failed to preserve the argument about the hearing examiner's remark by raising it before the Commission. "[S]tandalone arguments in footnotes are usually not considered fairly raised in any court."⁵¹ At best, Chesapeake's appeal of the hearing examiner's order *mentioned* the statement it has now placed at issue, but it failed to challenge it meaningfully in the body of its appeal.⁵² And a thorough reading of the transcript of the hearing before the Commission disclosed no discussion of the issue.⁵³ The Court will not decide a matter that was never properly put before the Commission.

CONCLUSION

The Commission has no statutory authority to consider the competitive interests of unregulated providers in a rate proceeding. Order 8860, granting DAAEP's intervention, and order 8878, affirming the hearing examiner's order, are thus **REVERSED** and **VACATED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

⁵¹ *Sabee Envtl. & Constr., Inc. v. Summit Dredging, LLC*, 149 A.3d 517 (Table), 2016 WL 5930270, at *1 (Del. Oct. 12, 2016).

⁵² See R. Ex. 7, at 2 n.5.

⁵³ R. at 9.